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In the Supreme Court of the United States

OCTOBER TERM, 1957

THOMAS GUY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 183-189; Pet. App. 15-20) is reported at 250 F. 2d 745.

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1958 (R. 190). A petition for rehearing was denied on February 8, 1958 (R. 191-195; Pet. App. 21). The petition for a writ of certiorari was filed on March 10, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 503(b)(1) of the Federal Food, Drug, and Cosmetic Act proscribes sales by a licensed

physician of large amounts of dangerous amphetamine drugs to persons who are not his patients, without physical examination of the purchasers, prescriptions, or supervision of use of the drugs.

STATUTES INVOLVED

Provisions of the Federal Food, Drug, and Cosmetic Act are as follows:

Section 503, 65 Stat. 648 (21 U.S.C. 353):

* * * * *

(b)(1) A drug intended for use by man which—

(A) is a habit-forming drug to which section 502(d) applies; or

(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or

(C) is limited by an effective application under section 505 to use under the professional supervision of a practitioner licensed by law to administer such drug,

shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dis-

pensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

* * * *

Section 301, as amended, 62 Stat. 582 (21 U.S.C. 331):

The following acts and the causing thereof are prohibited:

* * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

* * * *

Section 303, 52 Stat. 1043 (21 U.S.C. 333):

(a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine or not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

* * * *

STATEMENT

Petitioner was charged in a three-count indictment (R. 10-12) in the United States District Court for

the Northern District of Texas with dispensing certain potentially harmful drugs, transported in interstate commerce, without a prescription from a licensed practitioner, contrary to the provisions of Sections 503(b)(1) (21 U.S.C. 353 (b)(1)) and 301 (k) (21 U.S.C. 331 (k)) of the Federal Food, Drug, and Cosmetic Act (*supra*, pp. 2, 3). The jury found him guilty on all three counts. He was sentenced to imprisonment for five months under count one, and a $500 fine under count two. The imposition of imprisonment was suspended under counts two and three, with probation for four years (R. 23-24). On appeal, the judgment was unanimously affirmed (R. 26-27, 190).

The pertinent evidence adduced at the trial may be summarized as follows:

On March 2, 1956, one Spivak, an inspector for the Food and Drug Administration, posing as a truck driver, went to the office of petitioner, a licensed physician in Dumas, Texas, and obtained from him a prescription for 50 dexedrine tablets. Petitioner did not give Spivak a physical examination or ask the purpose for which he intended to use the tablets (R. 31-32). A few days later, again without a physical examination, Spivak obtained another prescription for 100 dexedrine tablets, and petitioner gave him a quantity of dextro-amphetamine-hydrochloride tablets to sample (R. 32-35).

On March 10, 1956 (count 1), Spivak told petitioner that he wanted some more of the amphetamine tablets which petitioner had given him to sample. Petitioner sold Spivak a bottle of 1000, 5 milligram

tablets of dextro-amphetamine-hydrochloride, manufactured by Lustgarten Laboratories, Philadelphia, for $10 (R. 3, 35-36). Petitioner did not write a prescription, and made no physical examination of Spivak nor did he tell him how he should take the tablets (R. 3-4, 37).

On March 22, 1956 (count 2), Spivak asked for another bottle, and petitioner sold to him 1000, 10 milligram dextro-amphetamine-sulphate tablets, manufactured by Richlyn Laboratories, Philadelphia, for $15 (R. 4, 39-40, 42). Petitioner did not write a prescription, nor did he give Spivak a physical examination or tell him how he should take the tablets (R. 4, 41).

On March 23, 1956 (count 3), Spivak returned to petitioner's office with an inspector named Keating. Spivak introduced Keating as another truck driver interested in obtaining amphetamine tablets. After Spivak vouched for Keating as a friend, petitioner sold Keating 1000, 5 milligram dextro-amphetamine-hydrochloride tablets for $10 (R. 4, 42-43, 46-51). Petitioner did not write a prescription, nor did he give Keating a physical examination or tell him how he should take the tablets (R. 4-5, 45, 52).

The prosecution introduced expert medical testimony as to the nature of the amphetamine drugs involved. In the underworld they are known under various names such as "bennies", "pep pills", and "goof balls" (R. 56-57). These drugs, because of their capacity for harmful effects, should be taken only after a proper physical examination and under medical supervision (R. 5, 61-62, 68-70). The sale of 1000 tablets at one time would not constitute medical

practice, but rather a "Wholesale drug business" (R. 5, 70). Unsupervised use of these drugs may cause blood vessels to break, adverse effects on the heart, convulsions, and even death (R. 5-6, 59-60, 63-64). The use of amphetamine drugs by truck drivers causes them to over-extend themselves and forego rest, thereby losing control over their nervous reactions (R. 6). These drugs may also cause resort to other drugs, such as barbiturates, to counteract effects of the amphetamines, thus resulting in a "vicious cycle" (R. 76-77).

Petitioner, testifying on his own behalf, denied the sales upon which his conviction was based (R. 7, 119, 142-143). Petitioner testified that on several occasions he took Spivak's blood pressure by testing his pulse (R. 103, 105, 132-133). Petitioner stated that he knew of no ill effects to his patients or to himself from use of these drugs (R. 130-131), and that he had never dispensed more than 500 of the amphetamine tablets at a time (R. 7, 147-148). In rebuttal, one Speegle testified that he had purchased amphetamines from petitioner in quantities of 1000 tablets or more at a time (R. 7-8, 164-166).

ARGUMENT

The thrust of petitioner's argument is that Section 503(b)(1) of the Federal Food, Drug, and Cosmetic Act (*supra*, pp. 2-3) is not broad enough to proscribe sales by a licensed physician of large amounts of dangerous amphetamine drugs without physical examinations of the purchasers, written prescriptions, and supervision of the manner in which the drugs are to be used.

Section 503(b)(1), however, does not single out any particular class and provide, for instance, that druggists shall not dispense harmful drugs, or that physicians shall not dispense them. Rather, it provides that the drugs "shall be dispensed [not saying by whom] only" upon prescription of a practitioner licensed by law to administer them. Anyone dispensing the drugs in a manner other than that provided by the statute—and this would include druggists, licensed physicians, and ordinary narcotics "pushers" —is a violator subject to conviction.

Petitioner's contention that this statute covers only druggists, and not physicians, is without merit. The over-all purpose of the Act is to protect the public from dangerous products (as the amphetamine drugs admittedly were) "from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer." *United States* v. *Sullivan*, 332 U.S. 689, 696; *United States* v. *Dotterweich*, 320 U.S. 277, 282. A similar purpose to protect the consuming public is evinced by congressional reports accompanying the bill which resulted in the 1951 amendment embraced in Section 503(b)(1) of the Act. See H. Rep. No. 700, 82d Cong., 1st Sess., pp. 2, 7; Sen. Rep. No. 946, 82d Cong., 1st Sess., pp. 3, 4.[1] In order to make

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[1] Sen. Rep. No. 946, 82d Cong., 1st Sess., p. 4, in speaking of the definition of dangerous drugs contained in paragraph (b)(1)(B) of the bill which became Section 503 of the Act, states: "When this language is given judicial interpretation consistent with the over-all purpose of the Federal Food, Drug, and Cosmetic Act to protect the public health it will effectively restrict to prescription sale all drugs that require professional supervision for their use."

effective this salutary purpose, it is both necessary, and entirely reasonable, to construe the statute as applicable to all violators endangering the safety of the public. Neither the statute itself nor its legislative history is susceptible of the conclusion that it covers only illegal dispensation of harmful drugs by druggists.

The mere order of a physician for a drug, unless it is used for a legitimate medical purpose, is not a prescription in the accepted sense of the word.[2] Cf. *Webb* v. *United States*, 249 U.S. 96; *Jin Fuey Moy* v. *United States*, 254 U.S. 189. Here petitioner did not even purport to prescribe. He dispensed the harmful drugs in wholesale quantities without written or oral prescriptions, and without professional supervision as required by the statute. The possible result was indiscriminate and unguided use of potentially harmful drugs by purchasers, deprived of the safeguards to their health, which the statute was designed to guarantee. The statute does not regulate the practice of medicine. As applied here, it merely provides that if a physician acts not as a physician but as an ordinary seller, and dispenses harmful drugs in a manner other than that provided by the statute, he is subject to prosecution. Cf. *United States* v. *10 Cartons, etc.*, 152 F. Supp. 360, 364-365 (W.D. Pa.).

This is not a case of an accused unable to determine, by reason of vagueness or uncertainty, whether

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[2] "Prescription" is defined in Webster's *New International Dictionary*, Second Edition, as follows: "A written direction for the preparation and use of a medicine; a medical recipe; also, a prescribed remedy."

the statute applies to his conduct. The jury could reasonably infer that petitioner was well aware that he was violating the law. Thus, when he made the sales, petitioner informed Spivak and Keating that in order not to make a "racket of it" he sold only to "a few friends" and asked Spivak to "vouch" for Keating (R. 43, 48-49, 4).[3]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1958.

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[3] Cases cited by petitioner are not in conflict with the decision below. In *Archambault* v. *United States*, 224 F. 2d 925 (C.A. 10) (Pet. 10), although the illegal sales without prescriptions were made by a person not a licensed physician, there was no holding that, if he had been a physician, he would have been exempt from provisions of the Act. In *United States* v. *2600 State Drugs*, 235 F. 2d 913 (C.A. 7), certiorari denied, 352 U.S. 848 (Pet. 11, 13), although the statute was held applicable to illegal sales without prescriptions by druggists (with which we agree), there was no holding that the statute applied to druggists exclusively. Neither of these cases is at variance with the position that Section 503(b)(1) applies to all persons who dispense harmful drugs in violation of its provisions.

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